Supreme Court of the United States.

OCTOBER TERM, 1942.

HOWARD B. PARKER,
Petitioner,
v.
UNITED STATES OF AMERICA ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts upon which the petition is based appear in the Statement in the petition and need not be restated here, although they will be somewhat amplified in the course of this brief. While it is recognized that this Court will not determine the question of whether it will grant the writ solely on the basis that the decision of the Circuit Court of Appeals was wrong, nevertheless we feel it necessary at the outset of this brief to show in outline form the error committed by the lower court before discussing the public aspects of the case, which we submit should move this Court to grant the petition.

The Decision of the Circuit Court of Appeals was Wrong.

It is firmly established that any relief granted in civil contempt proceedings must be remedial only and in no

sense punitive. Although a fine can be imposed, it is made payable to the use of the plaintiff and is not essentially different from execution issued on a money decree.

Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418.
In re Nevitt, 117 Fed. 448 (C.C.A. 8).
Nat'l Popsicle Corp. v. *Kroll*, 104 F. (2d) 259 (C.C.A. 2).

Where the decree in question is a money decree, as it was here, and where it does not command the contemnor himself to pay the money, but he is brought before the court upon the ground that he has prevented the party liable under the decree from making payment in conformity to it, a necessary corollary to this rule is that a compensatory fine cannot exceed the amount of prevention which the contemnor has accomplished. For example, if a corporation is ordered to pay $1,000 and has as its only assets $100 and one of its officers causes it to dissipate this $100, so that the plaintiff cannot obtain it in partial satisfaction of the decree, this would constitute an act of contempt for which a fine could be imposed upon the officer, but the fine could not exceed $100, the amount which the officer prevented the plaintiff from getting. There could be no warrant for imposing a fine of $1,000. That, in effect, is what the Circuit Court of Appeals has done in the present case.

The respondents' complaint against the petitioner is that he so managed Green Valley that it was without assets to respond to the money decree. Everything which he did necessarily centered around the price which he fixed for Green Valley to receive for its milk. The respondents claim that he fixed it at less than he should have to their detriment. In effect they placed as the amount that he should have caused it to receive a sum sufficient to pay the debt due to them plus the other expenses of the corpora-

tion. They give no account whatsoever to the fact that the business would not produce any such amount. The petitioner on the other hand has maintained the position throughout that the ceiling of the fine was the amount which he could have obtained for Green Valley and that in practice that necessarily meant the fair market value of the product sold for which he fixed the price. Our submission is that he could not be expected to extract blood from a stone and obtain a price which the market would not pay.

The fine imposed exceeded the fair market value by at least $15,000. Our contention is that it exceeded it by far more than that sum and we are prepared to demonstrate it by computations, but an excess of $15,000 is sufficient for purposes of the present brief.

The Circuit Court of Appeals dismissed this contention on the ground that whereas it might apply in some situations it would not where business was carried on with the specific intention of making sure that Green Valley never would have any assets with which to respond. In other words, the result of the decision is to say that the petitioner must have caused Green Valley to receive sufficient money to pay its debt, whether it was obtainable from the business or not. This, we submit, was clearly wrong.

An Important Federal Question is Presented.

The District Court had jurisdiction of the bill in equity only by reason of the provisions of U.S. Code, Title 7, Section 608(a)(6), which reads:

> "(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to

this chapter, in any proceeding now pending or hereafter brought in said courts."

This provision of the Agricultural Adjustment Act is fairly representative of the sanction provisions to be found in much of the current social legislation. These statutes which represent such an extremely important new departure in governmental control of the economy of the nation fall back for their ultimate sanction of enforcement upon the contempt powers of the federal courts sitting in equity.

The process of enforcing administrative directives by court decree developed to a considerable extent under the Federal Trade Commission Act, U.S. Code, Title 15, Sections 41 *et seq.* See *Federal Trade Commission* v. *Fairy Foot Products Company*, 94 F. (2d) 844 (C.C.A. 7). The more recent statutes have been more specific in their direction to the courts to use the equitable process to enforce the administrative determinations. Thus, by U.S. Code, Title 15, Section 77t(b), the Securities and Exchange Commission is authorized to enjoin violations of the Securities Act of 1933; by Section 77u(e) it may enjoin violations of the Securities Exchange Act of 1934; by Section 79r(f) it may enjoin violations of the Public Utility Holding Company Act of 1935; and by Sections 80a-35 and 41 it may enjoin violations of the Investment Company Act of 1940. So also the National Labor Relations Board is authorized to institute similar proceedings under Title 29, Section 160(e), although in that case the jurisdiction is confided to the Circuit Courts of Appeals. The administrator of the Wages and Hours Division of the Department of Labor is given similar entry to the District Courts by Title 29, Section 217. The Federal Power Commission is given a similar right under the Federal Power Act, Title 16, Section 825m, and the Federal Communications Commission has similar rights under the Communications Act of 1934, Title

47, Section 401(b), although in this instance money decrees are not authorized. (All of the above citations are to titles of the U.S. Code.)

The consequence of these provisions is that a great body of individuals who normally would never find their ways into a court of equity are now subject to its jurisdiction and must arrange their daily affairs with an eye upon the contempt power of the federal courts. In the administration of this power the proper use of the interlocutory injunction occupies a place of paramount importance.

The traditional purpose of the interlocutory injunction in equity is to preserve the status quo pending the litigation and to prevent irreparable injury to the plaintiff. Although a useful and necessary instrument of equity jurisdiction, it is a dangerous one. In practical effect an improvident temporary injunction results in a practical determination of the litigation against the defendant in advance of a trial.

This danger is specifically recognized by important federal statutes, and safeguards are set up against it. Thus interlocutory injunctions are immediately appealable pursuant to U.S. Code, Title 28, Section 227. More significant still are the statutory provisions dealing with injunctions in labor disputes. In this important field Congress has wisely enacted provisions restricting the use of temporary injunctions to a minimum. See U.S. Code, Title 29, Sections 101 *et seq.*

Interlocutory injunctions commanding compliance with regulatory administrative orders present a close parallel to similar injunctions in labor disputes. Both apply to economic relationships which are by and large foreign to the traditional jurisdiction of equity. The interests of the defendants in each are subject to greater harm from the operation of an interlocutory injunction than are the interests of the ordinary defendant in the ordinary bill in equity.

Consequently the proper construction to be placed on interlocutory injunctions of this sort and the fashion in which the courts should apply the contempt power to implement their commands present questions of true public concern which merit the attention of this Court.

The fine which has been imposed upon the petitioner is referable primarily to the interlocutory injunction of November 30, 1937. The "losses" which were adopted as the measure of the fine accrued in their major part prior to the entry of the final decree. Moreover, the final decree by its specific language commanded no payments accruing subsequent to January 15, 1939 (R. 3695, p. 16). Consequently, unless the interlocutory decree can be construed as commanding the petitioner to extract funds from the operations of Green Valley sufficient to pay accruals to the Market Administrator irrespective of economic possibility, there can be no possible warrant for the size of the fine, even upon the erroneous theory adopted by the lower court. The wording of the interlocutory decree was such as might have been taken from any form book. Certainly it did not specifically command the petitioner to obtain sums in the market which the market would not pay. If such a construction is to be placed upon its language, the interests of the public require that it should be placed upon it by this Court rather than by the Circuit Court of Appeals.

The pertinent provision in the decree was in paragraphs 3 and 4, which read:

> "3. That the defendant is hereby commanded and directed hereafter to pay to the market administrator all amounts which may hereafter become due and owing under the provisions of Order No. 4 as amended, during the pendency of this suit, the said payments to be made in the manner and at the times prescribed by said Order No. 4 as amended.

> "4. That the defendant, its agents, officers, employees, successors and assigns be and they hereby are commanded and directed to comply with all of the provisions of said Order No. 4 as amended during the pendency of this suit or until further order of this court." (Rec. 2, 3.)

It is submitted that this language is not susceptible to construction as a command to the petitioner to accomplish the impossible. Yet the Circuit Court of Appeals has so construed it. Traditionally courts of equity have refused to enter injunctions which cannot be obeyed. There is nothing here to suggest that on November 30, 1937, the District Court was departing from this cardinal principle of equity practice.

Moreover, it is significant that the respondents never suggested any such construction until it was placed in their mouths by the Circuit Court of Appeals; and the District Court itself did not construe it that way. Three weeks after the injunction was issued the respondents filed a petition for attachment. They did not make the petitioner a party (R. 3, 4), and they sought and received no such relief as has now been granted against the petitioner. The simple fine of $1,000 was imposed upon Green Valley (R. 8). A month later a similar petition was filed (R. 8-12). This time the petitioner was made a party, but no relief was granted against him and again Green Valley was fined $1,000 (R. 16). Except for this one petition on which no relief was obtained against the petitioner, the respondents never took any proceedings against the petitioner until after the Circuit Court of Appeals had affirmed the final decree. Obviously the Government did not construe the temporary injunction in the fashion in which the Circuit Court of Appeals has done.

The point is not that there could be any warrant for the petitioner in failing to obey a command imposed upon him by a decree; the question is whether what he has done constitutes disobedience to the command which was imposed. A strict construction is traditionally adopted on proceedings for contempt.

Terminal Railway Association v. *United States*, 266 U.S. 17, 29.

Berry v. *Midtown Service Corp.*, 104 F. (2d) 107 (C.C.A. 2).

American Trust Company v. *Wallis*, 126 Fed. 464, 466 (C.C.A. 3).

In re Sixth & Wisconsin Tower, 108 F. (2d) 538 (C.C.A. 7).

We submit that this question merits determination by this Court.

The Lower Courts have Confused the Important Distinctions between Civil and Criminal Contempt.

In contempt cases it often is difficult to ascertain at the outset whether the proceeding is in criminal or in civil contempt. It has been, however, firmly established in the federal courts that the distinction between the two is important and must be observed. Confusion on the point was set at rest by the decision of this Court in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. Where the contempt is civil, and a fine payable to the plaintiff can be imposed only on civil contempt, it is established that the relief must be remedial only and in no sense punitive. This is established by the *Gompers* case. In the present case there never has been a suggestion that the proceeding was one for criminal contempt. It has been conceded throughout that it is civil.

Yet it is perfectly apparent that punitive considerations appropriate only to criminal contempt were paramount in the fixing of the amount of the fine. The district judge made this particularly clear through his reference to "the cunning and persistence" of the petitioner and to his "cupidity." If there were any doubt, it would be set at rest by the statement at the end of his memorandum:

> "To assess a remedial fine against him in any amount less than that figure would be to put a premium on his misconduct." (R. 250.)

The opinion of the Circuit Court of Appeals quotes from and sets forth the numerous derogatory statements contained in the master's report and ties the conclusion of the court to punitive considerations through the statement following the quotation from the earlier opinion:

> "*We had in mind the purpose* for which Green Valley Inc. was maintained and operated by Parker as above stated." (Italics supplied.) (R. 267.)

The same thought is apparent from the further statement:

> "Parker's course of conduct had the *intended* effect." (R. 268.)

And finally from the language used in dismissing the petitioner's argument as to the proper measure of the fine where it was stated:

> "Perhaps this argument would be valid as applied to a corporation operating a business in a bona fide manner. Such was not the case here." (R. 270.)

In imposing punishment upon the petitioner through the guise of a remedial fine, the Circuit Court of Appeals has

failed to apply the law clearly laid down by this Court in the *Gompers* case and has created a diversity among the Circuits. The question of the intent of the contemnor, which necessarily is material in a criminal contempt proceeding, was considered by the Fifth Circuit in *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725. The court there said, at page 727:

> "It goes without saying that petitioner is right that the question of intent with which the claimed acts were done is not material, unless the acts are equivocal and resort to the intent with which they are done is necessary to make their meaning clear."

This cannot be reconciled with the inquiry made by the Circuit Court of Appeals for the First Circuit into the petitioner's intent in the present case. This conflict should be resolved by this Court.

This Court has recently considered the questions of criminal contempt in its opinion in *Nye* v. *United States*, 313 U.S. 33. A similar consideration of civil contempt in the present case would serve a useful public purpose.

There have been Such Departures from Ordinary Procedure as to Merit Revision by This Court.

From what has gone before it is apparent, we submit, that the fine was wrongly computed and that an injustice will be done to the petitioner if it is permitted to stand. The fashion in which this danger of injustice has been brought about is such that it should be corrected by this Court. The situation is not one where a simple error of law has been committed which does not constitute adequate ground for issuance of a writ of certiorari.

The Circuit Court of Appeals brushed aside the petitioner's contention with reference to the facts in a footnote. This, we submit, was indicative of the fashion in which the case had been handled throughout and of the difficulties with which the petitioner has been faced. The particular contention of the petitioner was that the effective prevention by the petitioner, if any, was of a very much smaller amount than that stated by the master and that this was apparent on the face of the report. The footnote in question appears at pages 269 and 270 of the record.

In considering the question of whether the petitioner caused Green Valley to receive all that it should under market conditions in return for its milk, it must be borne in mind that the value, or the amount which should be received, depended ultimately upon the use to which the milk was put, and consequently upon the classification between Class I and Class II milk. Theories of classification necessarily differ and consequently the precise amount which Green Valley should have received could not be determined until after painstaking audit and correct determination of the classification. There must, therefore, have been a certain tolerance in determining whether the prices which were fixed by the petitioner were proper prices or not. There was no dispute as to the amounts in fact paid.

The value of the Class I milk involved for the period from August 1, 1937, through December 31, 1939, was put forward by the Government in Exhibit 15 (R. 89, 90). That value was $154,639.02. This was arrived at by taking the figure fixed by the order for Class I milk and subtracting from it the stated allowance for freight to the Boston area which is the fashion specified by the order. Since Stuart paid the cost of transportation after the payment to Green Valley, this was the proper figure to compare with the amount paid to determine whether the latter

amount was sufficient or not. When it came, however, to the determination of the market value and the consequent deficit in that value to be found, the Government did not proceed upon these figures which it had supplied, but instead induced the master to make his finding upon an entirely different set of figures. The argument by Government counsel, which the master followed, appears at pages 242 through 244 of the record.

This argument was based upon a completely different set of tables and on the theory that the criterion of value should be what Stuart in fact paid to vendors other than Green Valley. If all other vendors had been considered and proper allowance made for the cost of transportation, this would have been a fair enough method, but the Government was very careful to exclude the outside purchases which would hurt its theory and to make no mention of the cost of transportation. To this end it prepared and submitted Exhibit 28 (R. 110-113) and the master adopted this exhibit as the basis for his finding of a fair market value of $179,649.06. A breakdown of the figures showing the outside purchases for the years 1938 and 1939 shows the unfair method of selection adopted by the Government in this particular. Stuart purchased from vendors other than Green Valley 491,886 pounds of milk at a total cost of $13,586.24. This would make an average price of $2.742 per hundredweight. This is the price which should have been taken as the basis for market value on the theory professed to be accepted by the master. He said:

> "prices actually paid by Stuart Milk Company for Class I milk purchased from others than Green Valley Creamery, Inc., would appear to be determinative of the fair market value of the products so purchased, and I adopt and accept those prices." (R. 31.)

Applying this hundredweight value to the milk purchased in the two years would show that Green Valley actually received from Stuart $14,647.07 more than the fair value. But the figures put forward by the Government and in fact taken by the master related to only 50.98% of the total outside purchases. These selected purchases amounted to only 250,770 pounds for which Stuart paid $8,152.72, or an average of $3.251 per hundredweight. Applying this value to the milk purchased from Green Valley showed a deficit in market value for the period of $9,596.11.

Furthermore, the transportation cost cannot be neglected. The master did not in fact include it and did not in any way purport to do so. Yet the Circuit Court of Appeals concluded that he must have taken it into account, "otherwise, the master's finding would be meaningless" (R. 270). On this particular point the master's finding was worse than meaningless; it was a gullible adoption of misleading figures put forward in such fashion that the intention to mislead cannot be doubted.

If the misleading base for determining market value arrived at by careful selection of outside purchases is adopted and the transportation cost is thrown back, the deficit in market value over the total period is less than $1,000, which represents a pretty close approximation at an *ex post facto* finding of value. Moreover, there was likewise a dispute between the parties as to the proper classification of a considerable quantity of milk because of which, if the petitioner had been right, the value of the Class I milk which it is said he did not get for Green Valley would have been decreased by nearly $9,000 (R. 20).

The refusal of the Circuit Court of Appeals to consider these points (which are typical of others which cannot be compressed into the compass of this brief) represents a definite departure from the orderly course of judicial proceedings. With it should be taken into account the fashion

in which the question of fine was brought into the litigation by that court on its own motion without the matter having been argued by either party or suggested even by the Government. The earlier opinion indicated a definite desire on the part of the Circuit Court of Appeals to force the petitioner as far as possible himself to pay the obligation of Green Valley, which the court itself recognized he is not legally liable for. It adopted a method of doing it which had not been argued and which it is submitted had not been thought through by the court. When the point was argued on the second appeal and the court was put in a position to think it through, it refused to consider it. This is the sort of departure from orderly procedure which justifies review by this Court.

Respectfully submitted,

RICHARD WAIT.